

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,288

634

WMA TRANSIT COMPANY, INC., a corporation,
Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondent

and

D. C. TRANSIT SYSTEM, INC.,
Respondent-Intervenor

APPEAL FROM FINAL ORDER OF THE WASHINGTON
METROPOLITAN AREA TRANSIT COMMISSION

BRIEF FOR PETITIONER AND APPENDIX

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 29 1968

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APPEAL FROM FINAL ORDER OF THE WASHINGTON
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BRIEF FOR PETITIONER

STATEMENT OF ISSUES PRESENTED*

I. Does the Commission have the statutory authority to condition a grant of a certificate of public convenience and necessity upon the recipient's entrance into an interline agreement?

II. Assuming that the Commission is so empowered, did it err in imposing such a condition in Order No. 824?

*This case has not previously been before this court.

JURISDICTIONAL STATEMENT

This is an appeal from a final order of Washington Metropolitan Area Transit Commission which Commission was created under the provisions of the Washington Metropolitan Area Transit Compact. Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 1410-16 (1961 Ed.)

Article XII, Section 17(a) of the aforesaid Compact provides for a review of any order of said Commission to this Court.

STATEMENT OF THE CASE

This is an appeal by WMA Transit Company (WMA Transit) from a portion of Order No. 824 of the Washington Metropolitan Area Transit Commission (Commission) which Order is dated on June 4, 1968. All of the facts set forth in this statement are contained in Order No. 824 (App. 3).

On March 25, 1966, the Commission on its Order No. 581 found, after notice and hearing, that the public interest required WMA Transit to extend its route so as to provide services to the 18th and L Streets, N.W., area (Farragut Square) of Washington, D.C. The Commission also found that the existing certificate of WMA Transit authorized the service extension ordered therein and the service extension so ordered by the Commission was initiated in June of 1966. D.C. Transit System, Inc. (D.C. Transit) sought a review of said Order in this Court and on March 7, 1967, this Court entered its Opinion and Order setting aside Order No. 581. *D.C. Transit System, Inc. v. Washington Metropolitan Area Transit Commission*, 126 U.S. Appeals, D.C. 210, ___ F.2d ___. This Court held that before authorizing the route extensions here in question, the Commission should have complied with certain statutory provisions of the Washington Metropolitan Area Transit Regulation

Compact (Compact), Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 1410-16 (1961 Ed.). A Commission Petition for a Writ of Certiorari was denied by the United States Supreme Court on October 9, 1967.

Soon after the decision of this Court, WMA Transit filed an application to amend its Certificate of Public Convenience and Necessity No. 8, to authorize the extension of its routes from the terminal at 11th Street at Pennsylvania Avenue, N.W., Washington, D.C. to Farragut Square. Filed concurrently with the application for Permanent Authority was an Application by WMA Transit for temporary authority to engage in the transportation sought to be authorized.

On October 24, 1967, the Commission issued its Order No. 751 in which it (a) set for hearing the application of WMA Transit for an amendment of its Certificate of Public Convenience and Necessity which would authorize it to provide a through bus service from the suburban areas of Maryland served by that carrier to Farragut Square in the District of Columbia and (b) granted WMA Transit temporary authority to perform such transportation pending determination of the application for permanent authority.

D.C. Transit sought a stay of that Order from this Court. As an outgrowth of that litigation, WMA Transit and DC. Transit entered into an agreement providing for the continuation of the service pending the Commission's consideration of the WMA Transit application. (App. 1)

Upon request, the Commission accepted the agreement as the basis for continuing the service during the interim period in lieu of the temporary authority it had issued.

Before the hearing could commence on the WMA Transit application, D.C. Transit filed two competing applications for operating authority; as the latter in essence duplicated in part the WMA Transit application. The applications of both Transit Companies were jointly heard commencing on January 29, 1968, by one or more of the Commissioners.

The application filed by WMA Transit set out routes extended out from 11th and Pennsylvania Avenues, N.W. to Connecticut Avenue and Eye Street, N.W. covering its regular service via the Pennsylvania Avenue Corridor. This application also provided for routing buses using the New York Avenue Corridor from New York Avenue and L Streets, N.W. to Connecticut Avenue and Eye Street, N.W.

One of the applications filed by D.C. Transit was for authority to run a new Pennsylvania Avenue Express Route intra D.C. between Southern Avenue at Pennsylvania Avenue, S.E. and Farragut Square, and the other application filed by D.C. Transit proposed a series of new D.C. Transit routes traveling interstate between Farragut Square and the Penn Mar Shopping Center in Forestville, Maryland, and between Farragut Square and Suitland, Maryland. Said proposed service in the state of Maryland was over routes theretofore exclusively serviced by WMA Transit.

The evidence adduced in the proceeding consists of a transcript of 1,174 pages of the testimony of 63 witnesses and 77 exhibits.

Sixty-one witnesses testified in support of the WMA Transit application, including three company officers and 58 public witnesses. One witness testified in support of the D.C. Transit applications; no member of the public supported the D.C. Transit applications. The staff of the Commission presented an analysis of the application by its chief engineer.

After taking the matter under advisement, the Commission by its Order No. 824 found that the public convenience and necessity required the granting of the WMA Transit application and the denial of the D.C. Transit applications.

Said Order of the Commission conditioned the granting of the WMA Transit application upon the entry into an Interline Agreement between WMA Transit and D.C. Transit the terms of which were expressly fixed by the Commission and the effect of which was to require WMA Transit to pay to D.C. Transit 3.4 cents for each revenue mile operated by WMA Transit in the extended service at an annual cost to WMA Transit of approximately \$3,000.00.

D.C. Transit sought no judicial review to this Court of Order 824, and WMA Transit, after its application for re-hearing was denied by the Commission, filed its petition herein asking only that Order No. 824 of the Commission be modified insofar as it required WMA Transit to enter into the Interline Agreement with D.C. Transit as a condition precedent to the grant of authority contained in said Order.

STATUTE INVOLVED

Washington Metropolitan Area Transit Regulation Compact.
Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 1410-16 (1961 Ed.).

Article XII

Certificates of Public Convenience and Necessity; Routes and Services.

4. (a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation; provided, however, that if any per-

son was bona fide engaged in transportation subject to this Act on the effective date of this Act, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within 90 days after the effective date of this Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(b) When an application is made under this section for a certificate, except with respect to a service being rendered upon the effective date of this Act, the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the transportation covered by the application, if it finds, after hearing held upon reasonable notice, that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise such application shall be denied. The Commission shall act upon applications under this subsection as speedily as possible. The Commission shall have the power to attach to the issuance of a certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require; provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

* * *

(e) The Commission may, if it finds that the public convenience and necessity so require, require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District; provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided, further, if the Commission shall be of opinion that the service rendered by such certificate holder over such route is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route; and further provided that no person subject to this Act may be required to extend any existing service or provide any additional service over additional routes within the Metropolitan District unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to this Act.

SUMMARY OF ARGUMENT

1. While it is true that the Washington Metropolitan Area Transit Commission does have the authority to attach conditions to the grant of authority under a Certificate of Public Convenience and Necessity such condition must (a) be reasonable and (b) must meet the test of public convenience and necessity. The commission itself found that the grant of the requested authority to WMA Transit

did not adversely affect D.C. Transit and the facts clearly show that the condition was unreasonable and not required by the public convenience and necessity.

2. Under the circumstances of this case the Washington Metropolitan Area Transit Commission found that the public convenience and necessity required the granting of the requested authority to W M A Transit and required that the applications of D. C. Transit be denied. The Commission further held that the remedy sought of D. C. Transit was not contemplated by the act. The Commission then erroneously attempted to create its own remedy under Article XII, Section 4 (e) by requiring W M A Transit, as a condition precedent to authority granted to it, to pay D.C. Transit for every revenue mile operated in the extended territory. This requirement is not contemplated by the act itself; is not the remedy provided under Section 4(e) of the act; is not reasonable and does not satisfy the public convenience and necessity.

ARGUMENT

I.

DOES THE COMMISSION HAVE THE STATUTORY AUTHORITY TO CONDITION A GRANT OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UPON THE RECIPIENTS' ENTRANCE INTO AN INTERLINE AGREEMENT?

There is no question but that under the provisions of Article XII, paragraph 4(e) of the Compact "The Commission shall have the power to attach to the issuance of a certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require; . . ." . Thus, the threshold question involved is whether an interline agreement requiring the payment of money by one carrier to another can

serve the public convenience and necessity. It is conceded by W M A Transit that if an interline agreement meets the test of public convenience and necessity then, if reasonable, the Commission does have the authority to so condition the certificate of public convenience and necessity. However, it is the position of W M A Transit that in each instance the condition must meet the test of reasonableness.

The wording of the Compact in this connection is similar to that contained in the Interstate Commerce Act, 49 U.S.C.A. 1 *et seq.*

In construing the provisions of the Interstate Commerce Act permitting the Interstate Commerce Commission to attach to the exercise of privileges granted by a certificate, such reasonable limitations as the public convenience and necessity might require, it has been held that the limitations must be reasonable and required by the public convenience and necessity. *Texas & Pacific Motor Transport Company, v. United States et al.*, D.C. Tex. 1949, 87 F.Supp. 107, reversed on other grounds 71 S. Ct. 422, 340 U.S. 450, 95 L.Ed. 409 rehearing denied, 71 S. Ct. 609-610, 341 U.S. 906, 95 L.Ed. 1344. It is the position of W M A Transit Company that the condition imposed by the Commission was neither reasonable nor in the public convenience and necessity.

II.

**ASSUMING THAT THE COMMISSION IS SO EMPOWERED,
DID IT ERR IN IMPOSING SUCH A CONDITION
IN ORDER 824?**

**The Condition Imposed by the Commission Was Not
Reasonable and Was Not Required by the Public
Convenience and Necessity.**

The statutory authority of the Commission to impose a condition is limited to conditions which are required by the public convenience and necessity (p. 6, *supra*). In order to explore the question of whether or not the public convenience and necessity required the imposition of the condition in this case it is necessary to look only to the findings of the Commission in the order which is appealed from.

The Commission found that the evidence "... overwhelmingly demonstrate that through service between residence and work is what is required by the public convenience and necessity." (App. 10) And that "In the face of all this evidence, we must conclude that through service to Farragut Square by WMA buses is required by the public convenience and necessity." (App. 11). The Commission further found that "... if it were necessary to apply the test of public convenience and necessity to D.C. Transit's suggested remedy of allowing it to provide the through service, we would have to conclude that the public interest would not be served thereby." (App. 21). And that "The alternative service to Farragut Square by transferring to D.C. Transit at 11th Street and Pennsylvania Avenue is inadequate to the requirements to the public convenience and necessity". (App. 24)

The Commission having therefore found that the public convenience and necessity required that W M A Transit's application be granted and that the D. C. Transit's applications be denied, the question remains of how the public convenience and necessity required a condition to be attached to the issuance of the certificate of W M A Transit's requiring it to enter into a contract with D. C. Transit whereby it paid D. C. Transit a monthly sum of money based upon the miles traveled by W M A Transit over the extended territory.

If the facts found by the Commission showed any adverse effect upon D.C. Transit then obviously such condition might serve the public convenience and necessity. Conversely, if there was no effect on D.C. Transit, then the public convenience and necessity would not be served and the condition must fall.

After carefully weighing all of the testimony and evidence the Commission found that the effect of granting W M A Transit's application would reduce D. C. Transit's passenger revenue by "*... less than one-tenth of one percent.*" (Emphasis supplied) (App. 15) And that the granting of the W M A Transit application would serve the public convenience and necessity "*without adversely affecting D. C. Transit*" (Emphasis supplied) (App. 15).

Thus, the Commission itself found that there would be NO ADVERSE EFFECT on D. C. Transit by the granting of the W M A Transit application. D. C. Transit has made no attempt to appeal the findings of the Commission and therefore both the Commission and D. C. Transit are bound by the Commission's findings.

Having found that the granting of the W M A application was in the public convenience and necessity with no adverse effect on D. C. Transit, it follows that the condition which the Commission imposed was not reasonable and that the Commission was therefore

without authority to impose the same. *Texas & Pacific Motor Transport Company v. United States, et al., supra.*

**The Commission Was in Error in Attempting To Use the
Interline Agreement To Satisfy the Requirement of
Article XII Paragraph 4(e) of the Compact**

The Provisions of Article XII Paragraph 4(e) are as follows:

"The Commission may, if it finds that the public convenience and necessity so required require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District; provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided, further, if the Commission shall be of the opinion that the service rendered by such certificate holder over such route is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route . . ."

The Commission correctly found that under the circumstances of this case there was an "impasse" (App. 18) and that the remedy sought by D.C. Transit was not even contemplated under the Compact (App. 18).

However, there was no foundation for the conclusion reached by the Commission that the requirement of an Interline Agreement was a remedy within the meaning of Section 4 (e) of the Compact.

The only time that the word "remedy" is used in said section is where it states that "such certificate holders shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route . . ." the Commission had already found that the certificate holder (D. C. Transit) could not under the circumstances of this case "remedy" the inadequacy of the transportation involved. It is urged that the statute in question has set forth the only remedy available to D. C. Transit and that the remedy sought to be imposed by the Commission is not founded on any statutory authority.

The Commission admits (App. 18) that the remedy sought by D.C. Transit, Inc. was not even contemplated by the Compact. However, the Commission then proceeds to provide a remedy which is likewise not contemplated by the Compact. It seeks to justify its solution by the standard of public convenience and necessity and by its own opinion, admits that ". . . we must test the remedy by the standard of public convenience and necessity and accept it only if it satisfies that standard."

If, by reason of the fact that there was no practical way of giving D. C. Transit the benefit of the protection of Section 4(e), and as a result thereof, D. C. Transit was adversely affected, then there might be reason for saying that the public convenience and necessity was thereby involved and this could be the basis for requiring the imposition of a condition such as the one imposed in this instance. However, that was not the case here. The effect on D. C. Transit was de minimis (one tenth of one percent of passenger revenue) and the Commission specifically found that there would be no adverse effect on D. C. Transit.

There being no adverse effect on D.C. Transit and there being only a benefit to the public, certainly it cannot be argued that the limitation was either reasonable or required by the public convenience and necessity.

CONCLUSION

Wherefore, W M A Transit respectfully prays that Order No. 824 of the Commission be modified insofar as it requires W M A Transit to enter into an agreement with D. C. Transit as a condition precedent to the grant of authority contained in said Order.

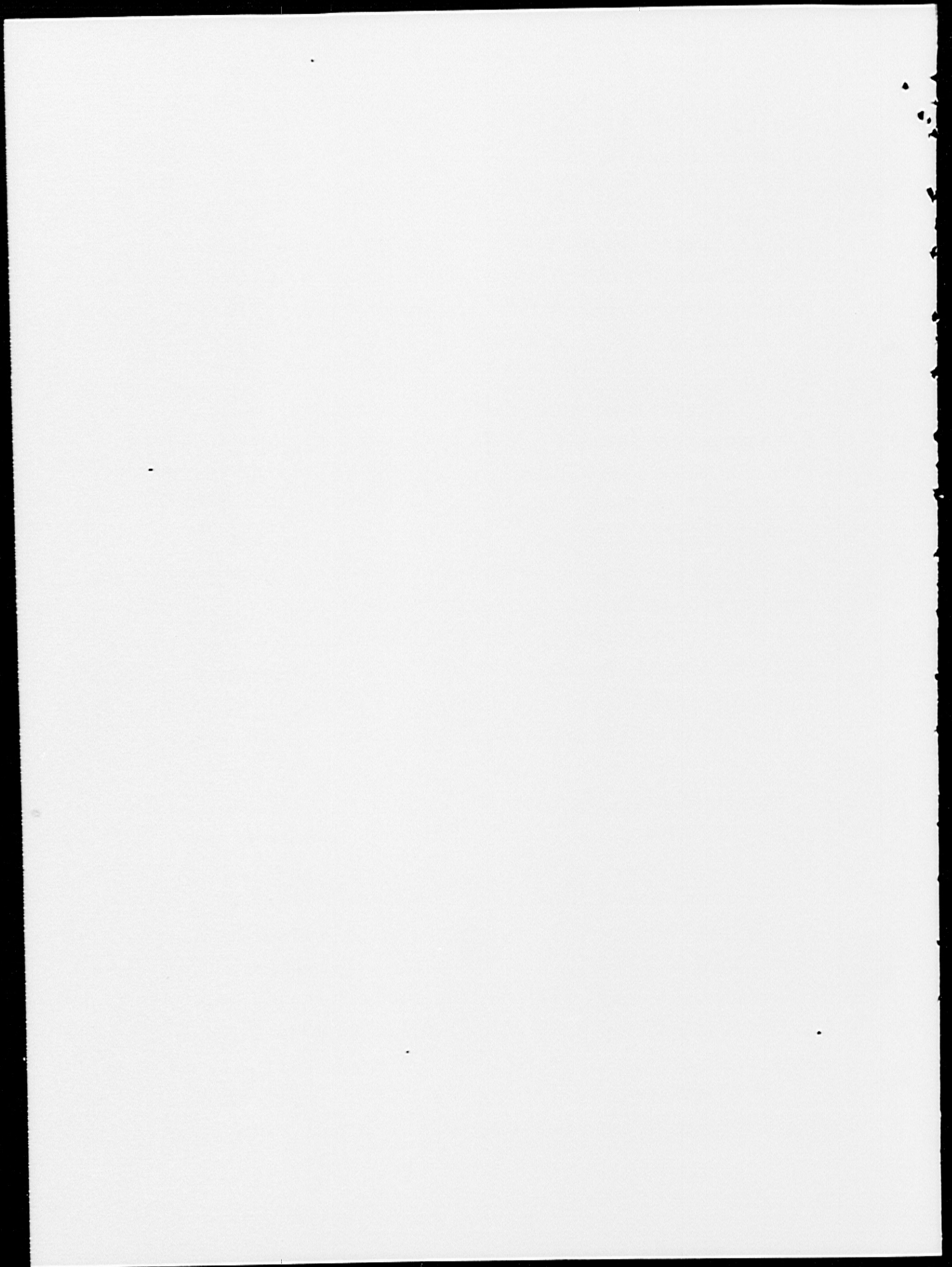
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(i)

APPENDIX

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[Filed December 4, 1967]

AGREEMENT

It is, this 4th day of December, 1967 agreed by and between W M A TRANSIT COMPANY, a Delaware Corporation, hereinafter termed "W M A", and D. C. TRANSIT SYSTEM, INC., a District of Columbia corporation, hereinafter termed "D. C. TRANSIT" as follows:

1. Effective from the date hereof and continuing until final determination by the Washington Metropolitan Area Transit Commission of W M A's application for a Certificate of Public Convenience and Necessity to extend its service from its present terminal at Pennsylvania Avenue and 11th Street, N. W. over routes presently served by D. C. Transit to the Farragut Square Area (hereinafter referred to as the "extended service"), W M A shall pay monthly to D. C. Transit an amount equal to the amount obtained from multiplying 3.4 cents per revenue mile by the number of revenue miles operated by W M A in the extended service during each month or a part thereof in such period of time. Notwithstanding any other provisions hereof nothing herein shall be construed to obligate D. C. Transit to reimburse W M A for any losses it may incur in its total system operations or in providing the extended service covered herein.

2. On or before the 15th day of each month W M A shall furnish D. C. Transit with a written statement certified as true and accurate by an officer of W M A authorized so to certify showing the number of revenue bus miles in such extended service operated by W M A during the prior month and shall concurrently therewith pay to D. C. Transit the amount due hereunder for such month or part thereof.

3. W M A agrees to procure and maintain during the term of this agreement an insurance policy in the limits and written by an

insurance company acceptable to the Commission and W M A shall protect, indemnify and save harmless D. C. Transit from any and all liabilities which may result from the operation contemplated herein. D. C. Transit shall be named in the insurance policy as one of the parties insured as its interest may appear and the said policy or certificate thereof shall be delivered to D. C. Transit. W M A Transit agrees to maintain all registration, drivers and public utilities licenses which may be required by the constituted authorities, and D. C. Transit shall not be responsible therefore.

4. Neither this Agreement nor any operations thereunder shall be construed as granting either party hereto any right to operate over any route or routes of the other party hereto.

5. This Agreement does not constitute a concession by WMA of any rights which it might have were it not for this Agreement.

6. Upon execution of this Agreement D. C. Transit shall file a Motion to Dismiss its Motion for a Stay pending appeal in Case No. 21,421 in the United States Court of Appeals for the District of Columbia Circuit provided that the Washington Metropolitan Area Transit Commission shall have terminated or withdrawn the temporary authority granted W M A by Order No. 751.

IN WITNESS WHEREOF the parties hereto have executed this agreement the day and year first above written.

W M A TRANSIT COMPANY

/s/ Illegible
Witness

By /s/ Woodrow W. Miller
President

D. C. TRANSIT SYSTEM, INC.

/s/ Lynne B. Myers
Witness

By /s/ Maurice Fox
First Vice President

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D. C.

ORDER NO. 824

IN THE MATTER OF:

Application of WMA Transit Company
for Amendment of Certificate of Public
Convenience and Necessity No. 8.

Served June 4, 1968

Application No. 425

Application of D. C. Transit System,
Inc., for Authority to Add its New
Route C-2 Within the District of Colum-
bia.

Application No. 462

Application of D. C. Transit System,
Inc., for Amendment of Certificate of
Public Convenience and Necessity No.
5.

Application No. 463

Docket No. 160

APPEARANCES:

STANLEY H. KAMEROW and DAVID S. GREENE, attorneys for
WMA Transit Company

MANUEL J. DAVIS and SAMUEL M. LANGERMAN, attorneys for
D. C. Transit System, Inc.

ALFRED S. TRASK, for the Federation of Citizens Associations of
the District of Columbia.

RUSSELL W. CUNNINGHAM, General Counsel, Washington Metro-
politan Area Transit Commission.

On March 25, 1966, this Commission issued Order No. 581 in
which it found, after notice and hearing, that the public interest re-
quired A. B. & W. Transit Company and WMA Transit Company to
extend their routes so as to provide bus service to the 18th and L
Streets, N. W. area (Farragut Square) of Washington, D. C. The
Commission also found that the existing certificates of those car-
riers authorized the service extensions ordered therein. The serv-
ice extensions required by Order No. 581 were initiated in May and
June of 1966. D. C. Transit System, Inc., ("D. C. Transit"), a pro-
testant, sought judicial review.

On March 7, 1967, the United States Court of Appeals for the District of Columbia Circuit entered its opinion and order setting aside Order No. 581. The Court of Appeals held that before authorizing the route extensions here in question, we should have complied with certain statutory provisions of the Compact. However, that Court stayed the issuance of its mandate pending appeal by the Commission to the United States Supreme Court.

Soon after the Court's decision, WMA Transit Company ("WMA") filed an application to amend its Certificate of Public Convenience and Necessity No. 8, to authorize the extension of its routes from the terminal at 11th Street and Pennsylvania Avenue, N. W., Washington, D. C. to Farragut Square. The Commission deferred processing the application until the conclusion of the litigation. A Commission petition for a Writ of Certiorari was denied by the Supreme Court on October 9, 1967.

Filed concurrently with the application for permanent authority was an application for temporary authority to engage in the transportation sought to be authorized.

On October 24, 1967, the Commission issued Order No. 751, in which it (a) set for hearing the application of WMA Transit Company for an amendment of its certificate of public convenience and necessity which would authorize it to provide a through-bus service from the suburban areas of Maryland served by that carrier to Farragut Square in the District of Columbia, and (b) granted WMA Transit Company temporary authority to perform such transportation pending determination of the application for permanent authority.

D. C. Transit sought a stay of that Order from the Court of Appeals. As an outgrowth of that litigation, WMA and D. C. Transit entered into an agreement providing for the continuation of the service pending the Commission's consideration of the WMA application.

Upon request, the Commission accepted the agreement as the basis for continuing the service during the interim period, in lieu of the temporary authority it had issued. Consequently, by Order No. 761 we cancelled Order No. 751.

Before hearing could commence on the WMA application, D.C. Transit filed two competing applications for operating authority as the latter in essence duplicated in part the WMA application and as the applications would be mutually exclusive, the Supreme Court's Ashbacker Doctrine required a consolidated hearing and decision. Accordingly, the applications were jointly heard commencing January 29, 1968, by one or more Commissioners.

Application No. 425 was filed by WMA Transit Company, and set out routes extended out from 11th and Pennsylvania Avenue, N.W. to Connecticut Avenue and Eye Street, N.W., covering its regular service via the Pennsylvania Avenue corridor. This application also provided for routing buses using the New York Avenue corridor from New York Avenue and L Street, N.W. to Connecticut Avenue and Eye Street, N.W.

Application No. 462 asked for authority for D.C. Transit to run a new Pennsylvania Avenue express route intra-D.C. between Southern Avenue at Pennsylvania, S.E. and Farragut Square.

Application No. 463 proposed a series of new D.C. Transit routes travelling interstate between Farragut Square and the Penn Mar Shopping Center in Forestville, Maryland, and between Farragut Square and Suitland, Maryland.

The evidence adduced in the proceeding consists of a transcript of 1,174 pages of the testimony of 63 witnesses and 77 exhibits.

Sixty-one witnesses testified in support of the WMA application, including three company officers and 58 public witnesses. One witness testified in support of the D.C. Transit applications; no mem-

ber of the public supported them. The Staff of the Commission presented an analysis of the applications by the Chief Engineer.

There was some procedural question as to the Commission's practice of processing extensions of service within the District of Columbia as route authorizations rather than certificate amendments. D.C. Transit specifically questioned WMA's application in this case for a certificate amendment rather than what it thought should be a route authorization request. The procedures followed by the Commission are clear and consistent. All route changes which come within the purview of a carrier's certificate are subject to change by route authorization; all changes which go beyond that purview, naturally, require an amendment on the certificate. In this case, the Court of Appeals had already ruled that a change in WMA's certificate is necessary. It is in light of that ruling that WMA processed its request in this proceeding as a certificate change.

D.C. Transit objected to the fact that WMA had not posted notices in its buses at the time its application was originally filed. D.C. Transit also objected to the fact that it was not served with a copy of WMA's Application No. 425 when it was filed in May, 1967. WMA indeed has failed to comply with the regulations of this Commission pertaining to the above aspects of notice, and it is adjured to exercise care in any future proceedings before this Commission lest it face dismissal of an application. In this case, however, it is clear that both D.C. Transit and the riding public had ample actual notice of this proceeding. D.C. Transit was informed of the application by Commission Order No. 751, issued October 24, 1967; and the application did not come up for public hearing until January 29, 1968. As far as the public was concerned, the presence of fifty-eight members of the public who took time to testify at the public hearings demonstrates broad awareness of the proceeding.

The issues in this proceeding are basically those raised by the application of WMA to extend its routes to the Farragut Square area of the District of Columbia. D.C. Transit also has applications pending for new routes from Farragut Square to certain areas now served by WMA. However, the position taken by D.C. Transit on its own applications makes it clear that starting point for our analysis must be WMA's proposal to serve the Farragut Square area.

The issues raised by that proposal are, first, those posed by Article XII, §4(b) of the Compact. On certain of these issues, there is no dispute. Counsel for D.C. Transit specifically stated at the hearing that D.C. Transit does not figure that WMA is "fit, willing and able to perform such transportation properly." Hence, the first question to which we must address ourselves is whether the transportation service in question is "required by the public convenience and necessity."

On this question, the parties are directly at odds. D.C. Transit contends that there is no need for the service to Farragut Square and that it would in fact be detrimental to the public interest while WMA argues that the public convenience and necessity require the service.

Discussion of the facts involved will delineate the issues more clearly. For many years, the terminal location in the District of Columbia for WMA passengers was 11th Street and Pennsylvania Avenue, N.W. This location was convenient to the Federal Triangle and to the traditional downtown areas of Washington. In recent years, an intense development of employment facilities took place in the general area centered upon Farragut Square. Recognizing the change, the Commission in its Order No. 581, issued March 25, 1966, directed WMA to provide direct service to Farragut Square. A new terminal area, serving some but not all of WMA's routes and

runs, was established at Connecticut Avenue and H Street, N.W. approximately 1 mile north and west of the 11th Street and Pennsylvania Avenue terminal. There are now about 2,440 people, viz., 4,880 one-way rides, going to and from the Farragut Square location daily on WMA's buses.

D.C. Transit points to the service provided on its routes between WMA's traditional terminal location at 11th Street and Pennsylvania Avenue, N.W., and WMA's Farragut Square terminal. D.C. Transit has 18 separate routes that travel between these general areas although none of them are identical with the WMA routing. Headways on these routes during rush hours range between 40 seconds and 1-1/2 minutes. D.C. Transit offered statistical evidence showing that it had adequate space available for WMA passengers on its buses traveling between the vicinity of 11th Street and Pennsylvania Avenue, N.W. and the vicinity of Farragut Square. According to their figures, a total of 12,066 additional passengers could be accommodated during rush hours. Relying solely on this statistical data concerning routes, schedules, and carrying capacities, D.C. Transit took the position that the WMA passenger would be provided with adequate service to Farragut Square by means of transfer to D.C. Transit buses at 11th Street and Pennsylvania Avenue, N.W. Hence, argued D.C. Transit, the proposed service was not required by the public convenience and necessity.

WMA took a somewhat different approach to determining public convenience and necessity. They introduced evidence, not only about the routes and schedules available, but about what people want. This evidence took several forms. The results of a survey were introduced. Passengers using the Farragut Square service were asked what they would do if the service were discontinued. Over 55% indicated that they would seek other modes of transportation. WMA

also sought out passengers who would be willing to testify at the hearing and provided them with transportation so that they might do so. Forty-six passengers took this means to appear before the Commission and present their views. Overwhelmingly, they were of the view that their use of mass transit stemmed from the availability of through service to Farragut Square on WMA's buses and that transfer service to D.C. Transit at 11th Street and Pennsylvania Avenue, N.W. would not be adequate service. One factor frequently alluded to in the attitudes and opinions expressed by the public witnesses is the fact that WMA service to Farragut Square involved no increase in fare, whereas transfer from a WMA bus to a D.C. Transit bus would involve an additional fare. Similar views were expressed by six witnesses who were employees of the Federal Communications Commission. This group independently sought out the Commission and asked to express their views. The offices of the FCC recently moved to the general vicinity of Farragut Square and the witnesses expressed their strong concern for the continuation of through-bus service to Farragut Square. The FCC itself went on record as favoring the continuation of the service. Finally, bearing upon the question whether the Farragut Square service is required by the public convenience and necessity, is the fact that the service is presently used by almost 2400 persons, making 4800 one-way rides daily.

The question we are considering is whether service by WMA to Farragut Square is required by the public convenience and necessity. We have summarized the evidence presented to us as to the alternative means of providing that service. We find WMA's evidence more convincing. Beyond question, there are thousands of people in WMA's service area who wish to travel to and from the neighborhood of Farragut Square. D.C. Transit urges that they can

make the journey by transferring to its vehicles. We are not convinced that this adequately meets the need.

D.C. Transit's own analysis is open to question. While there is frequent service when all D.C. Transit routes between 11th and Pennsylvania and Farragut Square are viewed as a composite, it is nevertheless true that the passenger must determine to ride a particular route and proceed to the stop for that route. Once there, a measure of delay significant to the passenger may ensue. The figures on carrying capacity may also be viewed in a different light. The figures provided show capacity available in fifteen minute periods. Within that period a given bus might be very crowded while another was not. To the passenger waiting at the stop, the availability of space may not be that which is indicated by D.C. Transit's evidence.

We must take into account passenger attitudes and reactions as shown by WMA's evidence. Both the survey and the testimony of bus riders overwhelmingly demonstrate that through service between residence and work is what is required by the public convenience and necessity.¹ We are impressed by the fact that over fifty persons would take the time from work to appear before us and testify as to their needs and desires. Their testimony was most convincing on the need for through service. Time and again, they testified that transfer to D.C. Transit buses did not meet their needs or desires. This oral testimony is backed up by a survey of a broad segment of those using the Farragut Square service. This survey indicated that

¹This fact is demonstrated by the profitability of this particular operation for WMA. A WMA witness introduced exhibits contending that new passenger revenue generated by the attractive through service amounted to over \$1500 per weekday, against something less than \$360 per day for the operating cost of extending the service to Farragut Square.

55% of those now using the service would abandon mass transportation if through service to Farragut Square were eliminated. We regard this survey as valid evidence of opinion of WMA riders generally. In the face of all this evidence, we must conclude that through service to Farragut Square by WMA buses is required by the public convenience and necessity.

It is also relevant to the question of public convenience and necessity to consider the impact of the WMA extension to Farragut Square upon traffic movement on city streets.

Mr. Daniel J. Hanson, Deputy Executive Vice President of the American Road Builders Association, was kind enough to appear and testify in this case because of his competence and expertise in the specific matter of traffic engineering. He was, for a period of about three years ending January 20, 1968, the Deputy Director for Traffic Engineering and Operations of the District of Columbia Highway Department. The gist of Mr. Hanson's testimony was that he was thoroughly familiar with all aspects of motor vehicle and pedestrian traffic in the Farragut Square area and that, in his opinion, the WMA extension into Farragut Square has reduced and would continue to reduce the total number of vehicles that would otherwise be regularly a part of the traffic pattern.

Another area of relevance in this inquiry was developed by Mr. Paul Foreman, Defense Coordinator for the General Services Administration. Mr. Foreman's testimony concerned the growing number of employees of Federal and District of Columbia agencies located in the immediate vicinity of Farragut Square. He referred to a previously introduced exhibit in this case showing that 4,800 WMA riders per day are destined for Farragut Square. He urged that the WMA service to Farragut Square be maintained, because, in his opinion, it represented an optimum situation.

Our inquiry into public convenience and necessity does not end there, however. We must consider not only the needs and desires of WMA's riders but the impact of this service upon D.C. Transit and its riders. From the viewpoint of their comfort and convenience, the D.C. Transit rider would, of course, benefit from allowance of WMA's proposal. The area between 11th and Pennsylvania and Farragut Square is the heart of the downtown area, and buses in this vicinity are already heavily used, usually to capacity. Even if D.C. Transit could take the additional 4,800 one-way rides daily, they would be carried on vehicles which are already carrying substantial loads. Hence, if the comfort or convenience of D.C. Transit patrons were considered alone, the answer would be simple; but we must also gauge the financial impact upon D.C. Transit and its riders.

Considerable evidence on this subject was introduced. Passengers who transfer from a WMA bus to a D.C. Transit bus and vice versa obtain the most economical fare by purchasing an interline ticket. On the basis of this fact, WMA estimated the revenue loss to D.C. Transit by analyzing interline ticket revenues. The amount of such revenues in 1965, prior to institution of WMA's Farragut Square service, was determined and was compared with such revenues for a similar period in 1967, after the WMA service was started. This analysis showed that D.C. Transit would lose about \$30,000 in revenues annually as a result of the Farragut Square service. The Commission staff reached a similar conclusion. Charles Overhouse, the Chief Engineer, estimated that D.C. Transit would lose about \$20,000 annually as a result of the proposed WMA service. He based this conclusion on information furnished the Commission by D.C. Transit's Vice President and Comptroller, Mr. Samuel Hatfield. Mr. Hatfield informed the Commission in a letter dated March 10, 1967, that he estimated that D.C. Transit's annual revenues would

be reduced by about \$33,000 as a result of the service extensions of both WMA and A.B. & W. Transit Company. Mr. Overhouse computed that the portion of this amount applicable to WMA's route extension was about \$20,000.

In presenting its evidence on financial impact in this proceeding, D.C. Transit took a position radically different from that expressed in Mr. Hatfield's letter. Mr. William E. Bell, another D.C. Transit Vice President, testified that D.C. Transit would lose almost \$277,000 annually as a result of WMA's Farragut Square service. This figure was based on the assumption that every single passenger who now rides WMA buses beyond 11th Street and Pennsylvania Avenue, N.W. would, if WMA's service did not exist, transfer to a D.C. Transit bus. This proposition is patently unacceptable. In the first place, WMA's buses make intermediate stops between 11th and Pennsylvania and Farragut Square. Many of those who now ride WMA beyond 11th and Pennsylvania to the first few stops beyond that point would merely walk the extra distance rather than transfer. Moreover, D.C. Transit's assumption flies in the face of testimony from a large number of bus riding witnesses who expressly denied that they would transfer. Many other riders undoubtedly hold similar views, as evidenced by WMA's survey which showed that, in the absence of through service on WMA, they would abandon public transportation. We conclude that D.C. Transit's estimate of a \$277,000 annual revenue loss was not a bona fide attempt to gauge the financial impact of WMA's service upon D.C. Transit but rather an effort to maximize the size of the possible loss.

We do have firm evidence of D.C. Transit's actual evaluation of the financial impact upon it of WMA's Farragut Square service. While this matter has been pending before this Commission on remand from the court, WMA has been providing service to Farragut

Square pursuant to an interline agreement entered into by WMA and D.C. Transit. Under the terms of that agreement, WMA has agreed to pay D.C. Transit 3.4 cents for each revenue mile operated by WMA on its routes between 11th Street and Pennsylvania Avenue and its Farragut Square terminal. The record here demonstrates that WMA will operate about 88,235 revenues miles annually and thus be liable for an annual payment to D.C. Transit of approximately \$3,000.

While this agreement is presently effective only until this matter is disposed of, D.C. Transit made it perfectly clear on the record of this proceeding that it would be willing to enter into an agreement on the same terms for an indefinite period of time, albeit subject to cancellation or renegotiation after a suitable period of notice. An agreement on the same terms for an indefinite period does exist between D.C. Transit and A.B. & W. Transit Company, covering A.B. & W.'s service to Farragut Square. The mileage run to Farragut Square by A.B. & W. calls for a payment under this agreement of about \$750 annually.

Here, then, is evidence as to the magnitude of the loss it expects to experience as a result of the Farragut Square extension. This is not a projection prepared for purposes of litigation but a determination based on the hard facts of the market place. D.C. Transit is willing to forego the revenues it would otherwise expect from WMA passengers in return for a payment to it of about \$3,000 per year. This is not the actual revenue it would expect from use of its own service, of course. Rather, it reflects the fact that D.C. Transit would incur no cost in receiving this \$3,000 in revenue. D.C. Transit's willingness to settle on these terms clearly indicates that it would not expect a revenue loss of \$277,000 but rather that its revenue loss would be in the \$30,000 range as suggested in Mr. Hatfield's letter to the Commission and as projected in the testimony

submitted by WMA. D.C. Transit's present regular route passenger revenues are approximately \$33,000,000 per year.

We conclude, therefore, that WMA's Farragut Square extension will reduce D.C. Transit's passenger revenues by less than one tenth of one percent. Weighing this negligible revenue loss against the very substantial benefits in improved service to WMA patrons and the slight but significant benefits in better service for D.C. Transit patrons, we conclude that WMA's proposed through bus service from the WMA service area to Farragut Square would serve the public convenience and necessity without adversely affecting D.C. Transit.

Having reached this determination, we must consider the issues raised by the provisions of Article XII §4(e) of the Compact. That section provides that before amending a certificate of convenience and necessity to authorize a route extension to operate over the routes of another carrier, the Commission must find that the service of the existing carrier is inadequate and must provide the existing carrier with reasonable time and opportunity to remedy the inadequacy.²

We have already, in effect, resolved the first of these questions in our ruling that the public convenience and necessity requires through bus service for patrons in the WMA service area to and from the Farragut Square area of the District of Columbia. It is impossible, having heard the testimony of the public witnesses, and having considered the other evidence, such as WMA's survey, to conclude that transfer service to D.C. Transit buses at 11th Street

² Article XII §4(g) contains language concerning remedying inadequacies identical to that set forth in §4(e). Since this proceeding concerns route extensions, we think that §4(e) is the more directly applicable provision. In any event, the procedures called for are identical.

and Pennsylvania Avenue, N.W., adequately meets the needs of WMA patrons.

The statistical evidence presented by D.C. Transit concerning its routes, schedules, and space availability simply does not meet the fact, amply demonstrated in this record, that the riding public demands and requires through bus service from origin to destination wherever possible. Not everyone can have through service, of course; but where, as here, such service is economically and physically feasible, it best serves the requirements of public convenience and necessity.

This brings us to the question of remedying the inadequacy. It would perhaps be best to begin with a discussion of the nature and intent of this requirement. This leads, in turn, to consideration of the nature of D.C. Transit's operating rights in the District of Columbia. The concept which seems to underlie D.C. Transit's position in this proceeding is that D.C. Transit has been granted exclusive operating rights, i.e., a monopoly, on service within the District of Columbia. Any attempt by others to provide new or extended service within the District is regarded as an unwarranted infringement of D.C. Transit's rights. Is this the approach we should follow in considering the issues here? We think not. Examination of D.C. Transit's franchise, and of the Compact, demonstrates unequivocally that the controlling concept is not the exclusivity of D.C. Transit's operating rights, but the public interest or, to use an equivalent phrase, the public convenience and necessity. Section 3 of D.C. Transit's franchise did not prohibit transit operations by others in the District of Columbia. It required only that such operations first be found to be required by the public convenience and necessity. Similarly, the procedural requirements set forth in the Compact have as their fundamental basis the public convenience and necessity.

We do not regard it as our function, therefore, to protect D.C. Transit's operating rights at the expense of the welfare of the riding public. (We emphasize, in this connection, that we must take into account the entire riding public, including D.C. Transit's riders and those of other companies.) Rather, operating rights must be adjusted so that the controlling standard, that of public convenience and necessity, is satisfied.

It is in that light that we take up the question of remedying the inadequacy we have found to exist. The remedy cannot simply be any measure whatever which will correct the deficiency in service. It must be a remedy which meets the tests of the public interest; it must serve the public convenience and necessity.

D.C. Transit has been aware for some time of the possibility that we might find existing service inadequate because it does not provide through service from WMA's service area to Farragut Square. It has taken advantage of this knowledge to consider and propose remedies in case such an inadequacy is found to exist.

They have suggested in this proceeding two possible remedies. The first remedy lies in Applications 462 and 463, consolidated for purposes of hearing in this proceeding, in which D.C. Transit proposes new routes running from certain points in WMA's service area to Farragut Square. D.C. Transit took the position that the service outlined in its applications was not, in its view, required by the public convenience and necessity. It is clear, therefore, that the only context in which we need view these applications is as a remedy under Article XII, §4(e). We do not believe that this proposed remedy meets the test of public convenience and necessity. Indeed, we do not think that such a remedy was even contemplated under the Compact.

It must be noted that the provisions of Article XII, §4(e) of the Compact do not simply apply to route extensions over the routes of D.C. Transit. They apply to the routes of all carriers. Hence, when D.C. Transit proposes to operate over the routes of WMA both within the District, in the areas in which WMA is authorized to provide intra-District service, and in Prince George's County, the provisions of Section 4(e) must be complied with in considering this proposal. Consider the situation this created. We find that existing service is inadequate in that riders in WMA's service area do not have through bus service to Farragut Square. If D.C. Transit's approach is accepted, we could not, on the one hand, allow WMA to provide through service without first permitting D.C. Transit to provide through service over WMA's routes. On the other hand, we could not allow D.C. Transit to operate over WMA's routes without first allowing WMA to provide the needed service. An impasse on remedying the inadequacy would exist if this theory were accepted. Obviously, the Compact did not contemplate that a solution to problems of this nature was to provide for complete duplication of routes when an extension is required on one end of a given set of routes. We conclude, therefore, that D.C. Transit's proposal to provide service to Farragut Square on new routes which deeply invade WMA's service area is not a "remedy" as contemplated by Section 4(e) of the Compact.

We might add that we are reinforced in this conclusion when, putting aside the fact that the remedy in question is not even contemplated by the Compact, we test that remedy by the standards of the public convenience and necessity. What is needed, we have found, is through service to Farragut Square for riders in WMA's service area. WMA can provide that through service by extending its routes about one mile in the downtown D.C. area. The only persons carried in this one mile extension would be persons originating in WMA's

service area. We have considered the financial impact which this extension would have on D.C. Transit and its riders and have concluded that it would be minimal.

D.C. Transit would remedy the inadequacy by creating two entirely new routes. One would penetrate into WMA's territory 5.5 miles at its furthest point and the other would extend 2.1 miles. These extensions would be along main arteries running through heavily populated neighborhoods in the area close to the District line. WMA's routes run along these same arteries but branch more widely into the neighborhoods located nearby and extend much further into Prince George's County. The net effect of D.C. Transit's proposal, therefore, would be to "skim the cream" off WMA's route structure. WMA would be required to serve the furthest ends of its routes while facing competition on the close-in arterial portions thereof. The potential deleterious effects on overall standards of service are obvious.

WMA attempted to estimate the financial impact upon it of D.C. Transit's proposal. WMA Exhibit 28 purports to analyze the total revenue which D.C. Transit would require to cover the fully allocated cost of providing the service proposed in its application. The dollar figures were determined by multiplying the fully allocated cost per mile, as reported by D.C. Transit in its annual reports to this Commission, times the number of miles involved in the proposed operations. The exhibit indicates that the cost involved in the operation proposed by Application 462 (Route C2) would be \$276,805, and that the cost involved in Application 463 (Routes C2 and C4) would be \$433,357. These two figures are totalled and a 5.3 percent factor is added to supply a profit at the authorized rate of return, making a total cost estimated by WMA of \$748,084. In fact, totalling the costs for each application ignores the fact that D.C. Transit's appli-

cations are actually offered in the alternative. It is the figures applicable to each, rather than the total, which are pertinent.

D.C. Transit offered its Exhibits 31 and 32, in which it estimated the costs involved in these operations. These exhibits covered only out-of-pocket costs, and did not fully allocate all expenses, as did WMA. Hence, the figures submitted by D.C. Transit are lower than WMA's. Specifically, D.C. Transit estimated out-of-pocket costs of \$176,662 for Application 462 (Route C2) and \$236,772 for Application 463 (Routes C2 and C4). We think D.C. Transit's figures are low. First, they do not take into account the recent substantial wage increase granted under the terms of the existing labor contract. Moreover, we think that fully allocated cost, other than out-of-pocket cost, is more pertinent when considering the impact upon WMA.

We conclude, therefore, that if D.C. Transit were permitted to operate the full service it proposes, i.e., Routes C2 and C4, and if it were to recover its fully allocated costs from revenues produced by this operation, the revenues lost to WMA would exceed \$400,000. This would amount to around 8 per cent of WMA's present revenues and would undoubtedly have a substantial impact upon the company and upon both its rate structure and its level of service. This 8 per cent impact contrasts sharply with the fact that D.C. Transit's revenues have apparently been reduced by less than one tenth of one per cent by WMA's route extension.

Finally, there is a substantial question, as brought out by the Commission staff, whether D.C. Transit could provide the service it proposes without adversely affecting its other services. D.C. Transit is presently missing scheduled runs because it lacks the men or equipment to perform them. We recognize that the cut runs are a small percentage of the schedule. Nonetheless, they occur in a regular pattern and with some frequency, thus raising the question

whether D.C. Transit is capable of performing the new service it proposes. Moreover, we are aware of many other areas, already within D.C. Transit's service area, in which additional service would be desirable. We have an obligation to ensure that D.C. Transit is capable of meeting these demands before we could allow it to begin invading the service area of others.

We conclude, therefore, that if it were necessary to apply the test of public convenience and necessity to D.C. Transit's suggested remedy of allowing it to provide the through service, we would have to conclude that the public interest would not be served thereby. Permitting D.C. Transit to operate as it proposes over the routes of WMA would have a deleterious effect on WMA's own service to points beyond D.C. Transit's proposed terminals. The financial impact upon WMA and its riders would be substantial and adverse. Permitting D.C. Transit to operate the service it proposes might have a substantial adverse effect upon its existing service in other areas. Further, assuming D.C. Transit did have the necessary resources to provide this service, we are not convinced that this would be the best way for it to apply those resources.

Having rejected a grant of D.C. Transit's applications as an acceptable remedy for the inadequacy we have found to exist, we can now take up the second remedy suggested by D.C. Transit. This is the possibility of an interline agreement. Again we emphasize at the outset that the mere proposal of this remedy does not mean that it must be accepted under the terms of Article XII, §4(e) of the Compact. Rather, we must test the remedy by the standard of public convenience and necessity and accept it only if it satisfies that standard.³ Our task is made easier here by the facts developed on the

³It is possible that in some situation the existing carrier would have no remedy to offer which would meet the necessary standard.

record concerning an interline agreement. We have previously noted that such an agreement presently exists albeit only for the period while this proceeding is in progress. Both WMA and D.C. Transit have indicated a willingness, however, to enter into an agreement for a longer period. They were unable to achieve an actual contract because their views on the termination arrangements for such an agreement differed. The existing agreement provides that WMA shall pay D.C. Transit 3.4 cents for each revenue mile operated by WMA in the extended service. The service presently involves 299.1 revenue miles each weekday (WMA Ex. No. 10), calling for a daily liability of about \$10. Taking into account weekends and holidays, the annual cost to WMA of the agreement is about \$3,000. Both D.C. Transit and WMA were willing to continue this basis for computing the payment required.

We should first consider whether such an interline agreement can be considered a "remedy" within the meaning of Section 4(e). We believe that it can. The inadequacy found to exist is the lack of through bus service. The Compact itself contemplates interline arrangements between carriers to provide "adequate transit service." Compact, Article XII, §7. This is a means available to a carrier to bring about through service and should be considered a possible "remedy" under Section 4(e).

Next, we must consider whether the particular agreement involved here serves the public convenience and necessity. We believe that it does.⁴ The amount of compensation, and its method of

In this situation, it is perfectly obvious that we would not be frustrated in remedying an inadequacy, or forced into adopting an unacceptable remedy. Rather, we could authorize a route extension by a new carrier without any action being taken by the existing carrier. Section 4(e) specifically states that the time and opportunity for remedy are to be reasonable, not absolute.

⁴The fact that the interline agreement is an appropriate remedy in the case presently before us does not necessarily mean that this

computation, are reasonable. They are related to the level of service provided and have a reasonable relationship to the amount of revenue which D.C. Transit might experience in the absence of the interline service. The payment called for does not impose a burden on WMA or upon its riders. It will not constitute a deterrent to the growth of the through service in question nor to the institution of other service improvements.

The only obstacle to agreement between the parties without the intervention of the Commission was the question of termination of the contract. WMA wished to have a permanent non-cancellable agreement while D.C. Transit wished to have the right to cancel upon a given period of notice. We will resolve this dispute by directing that the agreement shall continue in effect indefinitely with no change permitted therein except upon express approval by this Commission. This action by us has its basis, first, in our obligation to require that any remedy permitted under Section 4(e) serves the public convenience and necessity. We find that the present agreement does but we must scrutinize any change therein to ensure that the public interest continues to be served. Hence, no change could be made without prior approval. We are further empowered to maintain continuing jurisdiction over this interline agreement by the provisions of Article XII, §7 of the Compact, which gives us broad powers over the terms and conditions of such agreements.

is the automatic solution in every set of circumstances. For example, the shift of a route for a few blocks, whether or not it coincides with routes already being run by another carrier, might well have no significant impact on the operations of the existing carrier and hence not require the interline agreement technique. A case in point is the route authorization granted to A. B. & W. into the Southwest employment area by Order No. 816 and Route Authorization No. 1 - 68 on May 10, 1968. The remedy in any given case must be judged in the light of the circumstances of that case.

With this determination, our consideration of the issues in this proceeding is complete. WMA seeks authority to extend its routes from 11th and Pennsylvania Avenue, N.W. to Farragut Square. The applicant is fit, willing, and able to provide the service. The service is required by the public convenience and necessity. The alternative service to Farragut Square by transferring to D.C. Transit at 11th Street and Pennsylvania Avenue, is inadequate to the requirements of the public convenience and necessity. D.C. Transit's proposal to remedy this inadequacy by providing the service encompassed by its Applications 462 and 463 is not a "remedy" within the meaning of Article XII, §4(e) of the Compact. Moreover, even if it were a remedy, this proposal would not serve the public convenience and necessity. D.C. Transit's proposal to remedy the inadequacy by entering into an interline agreement on the terms and conditions discussed above is a remedy which serves the public convenience and necessity.

THEREFORE, IT IS ORDERED:

1. That Application No. 425, filed by WMA Transit Company, be, and it is hereby granted, on condition that WMA Transit Company comply with paragraph 2 of this order.

2. That WMA Transit Company and D.C. Transit System, Inc., shall enter into an interline agreement in the form set forth in D.C. Transit Exhibit No. 21 in this proceeding except that the words

" . . . continuing until final determination by the Washington Metropolitan Area Transit Commission of WMA's application for a Certificate of Public Convenience and Necessity to extend its service from its present terminal at Pennsylvania Avenue and 11th Street, N.W. over routes presently served by D.C. Transit to Farragut Square Area (hereinafter referred to as the 'extended service'),"

shall be stricken and the following words substituted:

"continuing until a change in this agreement is approved by order of the Washington Metropolitan Area Transit Commission."

3. That Applications Nos. 462 and 463, filed by D.C. Transit System, Inc., be, and they are hereby, denied.

BY THE COMMISSION

/s/ George A. Avery
Chairman

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D.C.

IN THE MATTER OF:

Application of W M A Transit Company
for Amendment of Certificate of Public
Convenience and Necessity No. 8.

Application No. 425

APPLICATION OF W M A TRANSIT COMPANY
FOR RECONSIDERATION OF ORDER NO. 824

W M A Transit Company respectfully requests reconsideration of Order No. 824 ("Order") pursuant to Section 16, Article XII, Title II of the Washington Metropolitan Area Transit Regulation Compact, Public Law 86-794, 74 Stat. 1031 (1960) ("Compact") and Rule 28 of the Rules of Practice and Procedure of the Washington Metropolitan Area Transit Commission ("Commission") on the grounds that the Commission made the following errors in the Order:

1. The Commission erred in finding that it was empowered to compel W M A Transit to enter into an Interline Agreement under the provisions of Article XII, paragraph 7 of the Compact.

2. The Commission erred in finding that the provisions of Article XII, paragraph 7 of the Compact had been met by the hearing on this case.

3. The Commission erred in directing W M A Transit Company to enter into an agreement with D.C. Transit System, Inc. as a condition precedent to the granting of an amendment to its Certificate of Public Convenience and Necessity.

4. The Commission erred in finding that the public convenience and necessity required the execution by W M A Transit Company of the agreement referred to in Order 824.

5. The Commission erred in finding that an interline agreement, not voluntarily arrived at by two carriers, can be considered a "Remedy" within the meaning of Section 4(e) of the Compact.

6. The Commission erred in finding that the Interline Agreement ordered by it in this case satisfied the requirements of Section 4(e) of the Compact.

7. The Commission erred in finding that the offer of W M A Transit Company to settle the controversy between the competing carriers was a continuing offer when in fact it was merely an offer of compromise.

8. The Commission erred in failing to grant the application of W M A Transit Company in this case without qualification.

WHEREFORE, applicant respectfully prays that the Commission:

a. Reconsider the order and modify the Order in accordance with this application for reconsideration.

b. Grant such other and further relief as may be just and proper.

Respectfully submitted,

/s/ Stanley H. Kamerow

Attorney for W M A
Transit Company

[Certificate of Service Omitted in Printing]

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION
WASHINGTON, D.C.

ORDER NO. 840

IN THE MATTER OF:

Served July 19, 1968

Application of WMA Transit
Company for Amendment of
Certificate of Public Conven-
ience and Necessity
No. 8.

Application No. 425

Application of D.C. Transit
System, Inc., for Authority to
Add its New Route C-2 Within
the District of Columbia.

Application No. 462

Application of D.C. Transit
System, Inc., for Amendment
of Certificate of Public
Convenience and Necessity
No. 5.

Application No. 463

Docket No. 160

The Commission has before it an application for reconsideration of Order No. 824, filed by WMA Transit Company. The application sets forth, in somewhat broad terms, certain errors allegedly present in Order No. 824. In general terms, it attacks the propriety of directing that an interline agreement be entered into as a remedy to

an inadequacy we have found to exist under Section 4(e) of the Compact. While we can determine the general grounds relied upon, WMA has not substantiated these allegations. It has recited no argument, no dissection of the statutes invoked, and, in fact, no discussion of any kind. Thus, we are left to hypothesize the basis of the grounds pressed upon us. In any event, in Order No. 824 we discussed our views as to the legal aspects of the questions we believe the application raises. The issues raised in WMA's application have, therefore, already been fully treated by the Commission.

THEREFORE, IT IS ORDERED that the application of WMA Transit Company for reconsideration of Order No. 824 be, and it is hereby, denied.

BY DIRECTION OF THE COMMISSION:

/s/ Melvin E. Lewis
Executive Director

KAMEROW & KAMEROW
Global Building, 1025 Vermont Ave., N.W.
Washington, D.C. 20005

August 23, 1968

Manuel J. Davis, Esquire
1420 New York Avenue, N.W.
Washington, D.C.

In Re: Washington Metropolitan Area Transit
Commission Order No. 824.

Dear Mr. Davis:

Pursuant to the requirements of the above Order and to telephone conversations which I have had with you and Mr. Cunningham, I herewith enclose to you original and three copies of the Agreement required by said order in which I have made the changes discussed with you.

App. 29

This agreement has been signed by W M A Transit Company and if the form is satisfactory to D.C. Transit, please have the same executed by D.C. Transit, and send the original to the Commission and one signed copy to me. If you have any questions concerning the form enclosed, I will, of course, be pleased to discuss the same with you.

It is fully understood that this agreement has been signed by W M A Transit Company for the purpose of complying with the requirements of Order No. 824 and is in no way to be considered as a waiver of any right of appeal of W M A Transit Company from Order No. 824.

Very truly yours,

Stanley H. Kamerow

SHK/hbb

Enc.

cc: Washington Metropolitan Area Transit Commission

AGREEMENT

It is, this ____ day of _____, 1968, agreed by and between W M A Transit Company, A Delaware Corporation, hereinafter termed "W M A", and D.C. Transit System, Inc., a District of Columbia Corporation, hereinafter termed "D.C. TRANSIT" as follows:

1. Effective from the date hereof and continuing until a change in this Agreement is approved by Order of the Washington Metropolitan Area Transit Commission or until this Agreement is invalidated by the United States Court of Appeals for the District of Columbia upon appeal of Commission Order No. 824, W M A shall pay monthly to D.C. Transit an amount equal to the amount obtained

from multiplying 3.4 cents per revenue mile by the number of revenue miles operated by W M A in the extended service over routes presently served by D.C. Transit between 11th and Pennsylvania Avenue, N.W. and Farragut Square during each month or a part thereof in such period of time. Notwithstanding any other provisions hereof nothing herein shall be construed to obligate D.C. Transit to reimburse W M A for any losses it may incur in its total system operations or in providing the extended service covered herein.

2. On or before the 15th day of each month W M A shall furnish D.C. Transit with a written statement certified as true and accurate by an officer of W M A authorized so to certify showing the number of revenue bus miles in such extended service operated by W M A during the prior month and shall concurrently therewith pay to D.C. Transit the amount due hereunder for such month or portion thereof.

3. W M A agrees to procure and maintain during the term of this agreement an insurance policy in the limits and written by an insurance company acceptable to the Commission and W M A shall protect, indemnify and save harmless D.C. Transit from any and all liabilities which may result from the operation contemplated herein. D.C. Transit shall be named in the insurance policy as one of the parties insured as its interest may appear and the said policy or certificate thereof shall be delivered to D.C. Transit. W M A agrees to maintain all registration, drivers and public utilities licenses which may be required by the constituted authorities, and D.C. Transit shall not be responsible therefore.

4. Neither this Agreement nor any operations thereunder shall be construed as granting either party hereto any right to operate over any route or routes of the other party hereto.

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5. This agreement does not constitute a concession by W M A of any rights which it might have were it not for this Agreement.

IN WITNESS WHEREOF the parties hereto have executed this agreement the day and year first above written.

W M A TRANSIT COMPANY

Witness

By _____
President

D.C. TRANSIT SYSTEM, INC.

Witness

By _____
First Vice President

In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,288

WMA TRANSIT COMPANY, INC., a corporation,
Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,
Respondent

and

D. C. TRANSIT SYSTEM, INC.,
Respondent-Intervenor

BRIEF FOR RESPONDENT-INTERVENOR

United States Court of Appeals
for the District of Columbia Circuit

FILED JAN 2 1969

Nathan J. Paulson
CLERK

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1420 New York Avenue, N. W.
Washington, D. C. 20005

Attorneys for D. C. Transit
System, Inc.

Dated: January 2, 1969

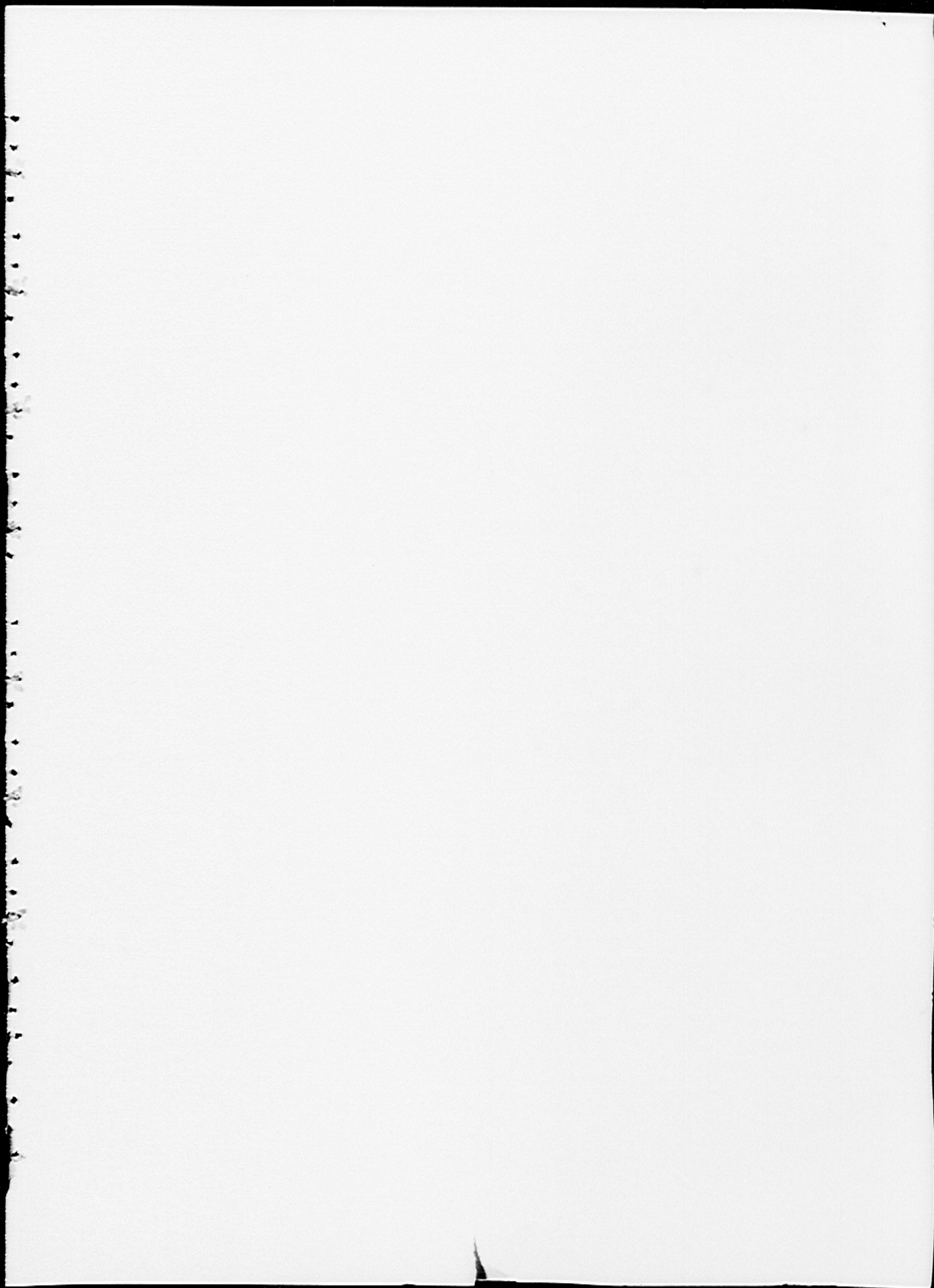


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In The
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,288

WMA TRANSIT COMPANY, INC., a corporation,

Petitioner

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent

and

D. C. TRANSIT SYSTEM, INC.,

Respondent-Intervenor

BRIEF FOR RESPONDENT-INTERVENOR

STATEMENT OF ISSUES PRESENTED*

I. Does the Commission have the statutory authority to condition a grant of a certificate of public convenience

* This matter has previously been before this Court in Case No. 20,188, D. C. Transit System, Inc., Petitioner v. Washington Metropolitan Area Transit Commission, Respondent, WMA Transit Company, Intervenor, decided March 7, 1967; and Case No. 21,421, D. C. Transit System, Inc., Petitioner v. Washington Metropolitan Area Transit Commission, Respondent, WMA Transit Company, Intervenor, Dismissed by agreement December 11, 1967.

and necessity upon the recipient's entrance into an interline agreement?

II. Assuming that the Commission is so empowered, did it err in imposing such a condition in Order No. 824?

JURISDICTIONAL STATEMENT

This is an appeal from a final order of Washington Metropolitan Area Transit Commission which Commission was created under the provisions of the Washington Metropolitan Area Transit Regulation Compact. Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 1410-16 (1961 Ed.).

Article XII, Section 17(a) of the aforesaid Compact provides for a review of any order of said Commission to this Court.

STATEMENT OF THE CASE

The Statement of the Case set forth in Petitioner's Brief fully sets forth the facts of record.

STATUTE INVOLVED

Washington Metropolitan Area Transit Regulation Compact. Public Law 86-794, 74 Stat. 1031 (1960), 1 D.C. Code 1410-16 (1961 Ed.).

ARTICLE XII

Certificate of Public Convenience and
Necessity; Routes and Services

4.(a) No person shall engage in transportation subject to this Act unless there is in force a certificate of public convenience and necessity issued by the Commission authorizing such person to engage in such transportation; provided, however, that if any person was bona fide engaged in transportation subject to this Act on the effective date of this Act, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within 90 days after the effective date of this Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

(b) When an application is made under this section for a certificate, except with respect to a service being rendered upon the effective date of this Act, the Commission shall issue a certificate to any qualified applicant therefor, authorizing the whole or any part of the transportation covered by the application, if it finds, after hearing held upon reasonable notice, that the applicant is fit, willing and able to perform such transportation properly and to conform to the provisions of this Act and the rules, regulations, and requirements of the Commission thereunder, and that such transportation is or will be required by the public convenience and necessity; otherwise such application shall be denied. The Commission shall act upon applications under this subsection as speedily as possible. The Commission shall have the power to attach

to the issuance of a certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require; provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(e) The Commission may, if it finds that the public convenience and necessity so require, require any person subject to this Act to extend any existing service or provide any additional service over additional routes within the Metropolitan District; provided, however, that no certificate shall be issued to operate over the routes of any holder of a certificate until it shall be proved to the satisfaction of the Commission, after hearing, upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public necessity and convenience; and provided, further, if the Commission shall be of opinion that the service rendered by such certificate holder over such route is in any respect inadequate to the requirements of the public necessity and convenience, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to operate over such route; and further provided that no person subject to this Act may be required to extend any existing service or provide any additional service over additional routes within the Metropolitan District unless the carrier is currently earning a reasonable return on its operation as a whole in performing transportation subject to this Act.

(g) Certificates shall be effective from date specified therein and shall remain in effect until suspended or terminated as herein provided. Any such certificate, may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may, upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for wilful failure to comply with any lawful order, rule, or regulation of the Commission, or with any term, condition, or limitation of such certificate; provided, however, that no certificate shall be revoked (except upon application of the holder) unless the holder thereof wilfully fails to comply, within a reasonable time, not less than 30 days, to be fixed by the Commission, with a lawful order of the Commission commanding obedience to the rules or regulations or orders of the Commission, or to the terms, conditions, or limitations of such certificate found by the Commission to have been violated by such holder. No certificate shall be issued to an applicant proposing to operate over the routes of any holder of a certificate unless and until it shall be proved to the satisfaction of the Commission, after hearing upon reasonable notice, that the service rendered by such certificate holder, over such route, is inadequate to the requirements of the public convenience and necessity; and provided, further, if the Commission shall be of the opinion that the service rendered by such certificate holder over such route is in any respect inadequate to the requirements of the public convenience and necessity, such certificate holder shall be given reasonable time and opportunity to remedy such inadequacy before any certificate shall be granted to an applicant proposing to operate over such route.

Through Routes, Joint Fares

7. (a) In order to encourage and provide adequate transit service on a Metropolitan District-wide basis, any carrier may establish through routes and joint fares with any other carrier subject to this Act or the jurisdiction of the Interstate Commerce Commission, the State Corporation Commission of the Commonwealth of Virginia, or the Public Service Commission of the State of Maryland.

(b) Whenever required by the public convenience and necessity, the Commission, upon complaint or upon its own initiative, and after hearing held upon reasonable notice, may establish through routes and joint fares for transportation subject to this Act, and the regulations or practices affecting such fares, and the terms and conditions under which such through routes shall be operated.

(c) Whenever, upon complaint or upon its own initiative, and after hearing upon reasonable notice, the Commission is of the opinion that the divisions of any joint fare for transportation subject to this Act are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers, the Commission shall prescribe the just, reasonable and equitable divisions thereof to be received by the participating carriers. The Commission may require the adjustment of divisions between such carriers from the date of filing the complaint or entry of the order of investigation, or such other date subsequent thereto as the Commission finds to be just, reasonable and equitable.

Administration Powers of Commission; Rules, Regulations and Orders

15. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Such rules and regulations may prescribe

the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty (30) days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

Interstate Commerce Act, Part II,

Section 212(a), Suspension, Change, Revocation, and
Transfer of Certificates, Permits, and Licenses.

"...or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license:"

Public Law 84-757, 84th Congress, H.R. 669,
July 24, 1956, 79 Stat. 598, An Act to Grant a
Franchise to D. C. Transit System, Inc.

SUMMARY OF ARGUMENT

The Commission, under Section 7(a) of the Compact, may order any certificated carrier under its jurisdiction to establish through routes and joint fares with any other carrier subject to this Compact and under Section 7(c) of the Compact may, upon its own initiative, prescribe the just, reasonable and equitable divisions of any joint fare for transportation, subject to the Compact. Section 7(c) further provides that the Commission may require the adjustment in divisions between such carriers to such date as the Commission finds to be just, reasonable and equitable.

The Commission, under Section 15 of the Compact, is given the power to perform any and all acts and to prescribe, issue, make, amend, and rescind such orders... it might find necessary or appropriate to carry out the provisions of the Compact.

Briefly stated, the Commission has overall jurisdiction and power over parties subject to its jurisdiction under this Compact to make any and all orders that it finds to be in the public interest.

ARGUMENT

I

DOES THE COMMISSION HAVE THE STATUTORY AUTHORITY TO CONDITION A GRANT OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY UPON THE RECIPIENTS' ENTRANCE INTO AN INTERLINE AGREEMENT?

Petitioner prefaces his argument covering the question herein raised by conceding that "there is no question but that under the provision of Article XII, Paragraph 4(e) of the Compact, the Commission shall have the power to attach to the issuance of a Certificate and to the exercise of the rights granted thereunder, such reasonable terms and conditions as the public convenience and necessity might require." Petitioner then proceeds to question whether that portion of the Commission's order directing the Petitioner to enter into an interline agreement with Transit is a type of condition contemplated within the Compact. Petitioner further concedes, at the top of

Page 9 of its Argument, that if the interline agreement meets the test of public convenience and necessity then, if reasonable, the Commission does have the authority to so condition a certificate of public convenience and necessity. The Petitioner further concedes, as part of the same statement, that it is its position that in each instance the condition must meet the test of reasonableness.

Respondent-Intervenor concurs with the statements herein before set forth and further states that in each instance the condition imposed not only upon the Petitioner but upon the Respondent-Intervenor is reasonable and meets the test of public convenience and necessity. Circumstances and conditions within the transit industry operating in the Metropolitan Area of the District of Columbia under the jurisdiction of the Commission warranted this Court in holding that "clearly this implies the right of the Transit Commission to establish, within statutory limitations, new rules based on its own conception of the needs of mass transit of persons in this highly populated area." This court, in the matter of Alexandria, Barcroft and Washington Transit Company v. Washington Metropolitan Area Transit Commission, No. 8933, United States Court of Appeals, Fourth Circuit, 323 F.2d 777 (1963), stated in part:

"The impact of rules and decision of such public bodies as 'stare decisis' for the present Transit Commission is, therefore, limited. These decisions, and those of reviewing courts, may aid in the search for the meaning of a statutory phrase and, perhaps, help point up the outer limits of administrative discretion; but they 'cannot generally be used to show the path the Transit Commission must follow' in determining the requirements of the public convenience and necessity.

[2] That this is so is made apparent by Title II, Article XII, § 21, of the Compact which makes prior decisions of the Interstate Commerce Commission and the local commissions effective and enforceable only until the Transit Commission provides otherwise. Clearly this implies the 'right of the Transit Commission to establish, within statutory limitations, new rules based on its own conception of the needs of mass transit of persons in this highly populated area.'" (Emphasis supplied)

When we consider the overall problems that confronted the Commission in considering which of the Applications best serve the interest of public convenience and necessity and the terms of the Compact set out in Article XII, Section 4(e) and 4(g), it must be apparent that the Commission's determination in this case was fair, just and reasonable. Any contrary determination reached by the Commission would have imposed restrictions upon the rights granted the Respondent-Intervenor by

its Franchise and the certificate of public convenience and necessity issued to it by the Commission under the Compact. The same would be equally applicable to the Petitioner. It should be noted that the Petitioner, during the course of the hearing, agreed to accept the condition as part of an agreement with the Respondent-Intervenor if it was agreed, that the said agreement was made permanent and non-cancellable.

Respondent-Intervenor was agreeable to entering into the Agreement if it was authorized to cancel it by the giving of thirty days notice by either party. This Commission, in its wisdom, kept in tact the Interline Agreement now contested by the Petitioner and as a reasonable approach to the situation concluded that the cancellation or modification of the Agreement would be subject to the Commission's prior order. In view of the fact that the Commission has the statutory authority to impose the condition herein complained of and so concluded, only after first having reviewed all of the facts, Exhibits and evidence of record, and weighed the impact thereof on the public as well as both Transit Companies, this Court should determine that the order herein questioned by the Petitioner is just, reasonable and meets the test of public convenience and necessity.

II

ASSUMING THAT THE COMMISSION IS SO
EMPOWERED, DID IT ERR IN IMPOSING
SUCH A CONDITION IN ORDER 824?

The Condition Imposed by the Commission
Was Reasonable and Was Required by the
Test of Public Convenience and Necessity.

Petitioner repeats the basic theme that the authority of the Commission to impose a condition is limited to conditions which are required by the public convenience and necessity. Respondent-Intervenor concurs. However, Petitioner, quoting from the Order of the Commission, misleads this Court by only picking out certain convenient words and phrases. The quotes are true insofar as they go, but the Commission was discussing a much broader problem - the impasse which arose by applying the terms of the Compact set forth in Article XII, Section 4(g), which provides a reasonable time and opportunity to remedy any inadequacy before a Certificate would be granted to another Applicant.

It should be noted that the Commission did not find the service of Respondent-Intervenor to be inadequate. The Commission merely found that a through service was needed from the Maryland origins. The pre-existing transfer service was not found inadequate as such. Therefore, the service offered by Respondent-Intervenor was, in fact, adequate.

The inadequate service was actually being offered by Petitioner who could not offer the needed through service after transporting its riders within a short distance of their final destination. The Commission faced up to this 'empasse' by affording the public the through service it found to be needed and imposing the condition to reimburse Respondent-Intervenor the calculated loss in revenue it would sustain.

Petitioner now goes a step further and argues that the condition imposed by the Commission - which it in fact agreed to during the hearing - could not satisfy the public convenience and necessity because the granting of the Certificate to Petitioner had no adverse affect upon Respondent-Intervenor. Again Petitioner arrived at its conclusion without benefit of the entire picture. The Commission only concluded "that WMA's proposed through bus service from the WMA service area to Farragut Square would serve the public convenience and necessity without adversely affecting D. C. Transit" when, among other aspects, it weighed Respondent-Intervenor's loss of revenue against the benefits of improved service to WMA patrons as well as a slight benefit in better service for D. C. Transit patrons. Although the loss of passenger revenue to Respondent-Intervenor may only be one-tenth of one percent, it was a loss and the imposed condition by the Commission offers the only possible remedy for the situation. Such a solution,

being just to all parties, is reasonable and does fulfill the test of public convenience and necessity, and Respondent-Intervenor accepted the Commission's findings believing that the ultimate determination by the Commission was in the best interest of the traveling public.

The Commission Was Not in Error
in Attempting to Use the Inter-
line Agreement to Satisfy the
Requirement of Article XII
Paragraph 4(e) of the Compact

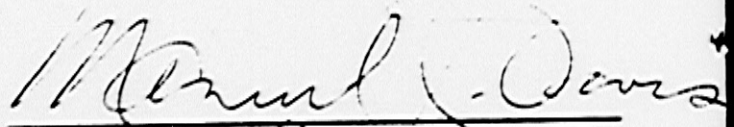
Qualifying its argument that the Commission erred by imposing the Interline Agreement to satisfy the requirements of Article XII, Section 4(e) of the Compact, Petitioner reiterates the previous arguments that the condition was not reasonable, that there was no adverse affect on Respondent-Intervenor, and that the condition did not satisfy the test of public convenience and necessity. Although the results reached by Petitioner herein are repetitious, Petitioner does bring forth the question of a "remedy" within the meaning of Section 4(e). The Commission answered this question when it said "The Commission itself contemplates interline arrangement between carriers to provide 'adequate transit service.' Compact, Article XII, Section 7. This is a means available to a carrier to bring about through service and should be

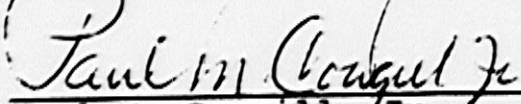
considered a possible 'remedy' under Section 4(e)."
(App. 22).

Certainly the broad powers given the Commission by Sections 7 and 15 of the Compact and the language set forth in A.B.&W. Transit Company v. Washington Metropolitan Area Transit Commission, supra, more than demonstrates the ability of the Commission to impose the questioned condition. See our prior arguments herein. The Commission, cloaked with proper authority, has set forth a solution in the best interest of the traveling public. By the very definition of the word "remedy", to give legal redress to; to render justice to,^{1/} the Commission has met the test.

CONCLUSION

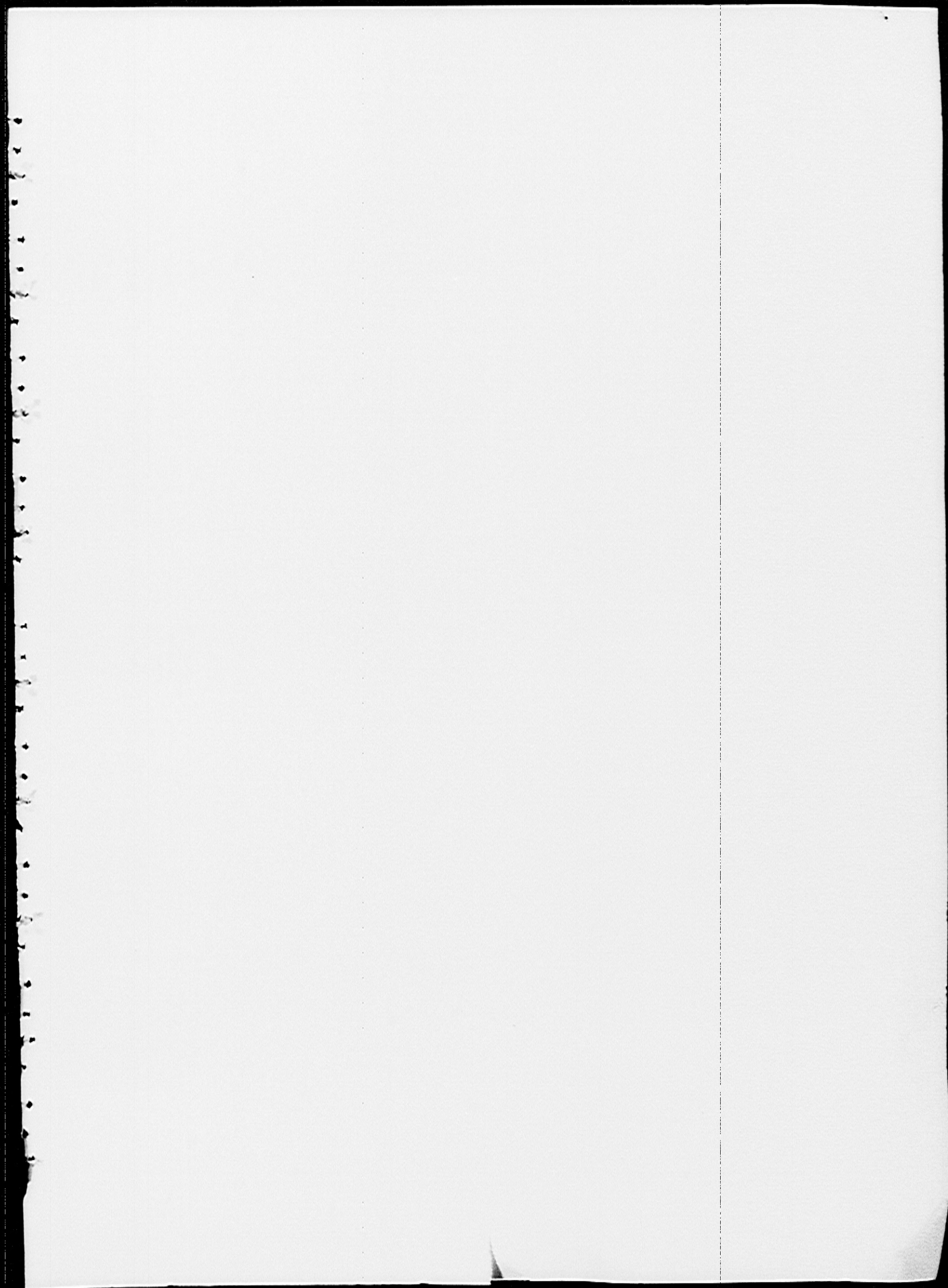
WHEREFORE, D. C. Transit System, Inc. respectfully prays that Order No. 824 of the Commission be affirmed in its entirety.


Manuel J. Davis


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1420 New York Avenue, N. W.
Washington, D. C. 20005
835-5080

Attorneys for D. C. Transit
System, Inc.

^{1/} Webster's New International Dictionary of the
English Language, Second Edition, Unabridged.



BRIEF FOR RESPONDENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,288

WMA TRANSIT COMPANY, INC., a corporation,

Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

Respondent,

and

D. C. TRANSIT SYSTEM, INC.

Respondent-Intervenor

PETITION TO REVIEW ORDER OF THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 31 1968

Nathan J. Paulson
CLERK

RUSSELL W. CUNNINGHAM
General Counsel
Washington Metropolitan
Area Transit Commission
1815 North Fort Myer Drive
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QUESTIONS PRESENTED

I. In a case where a carrier is extending service over the routes of another carrier, does the Commission have the statutory authority to condition a grant of a certificate of public convenience and necessity upon the recipient's entrance into an interline agreement?

II. Assuming that the Commission is so empowered, did it err in imposing such a condition in Order No. 824?

This case has not previously
been before this court.

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UNITED STATES COURT OF APPEALS
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Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION,

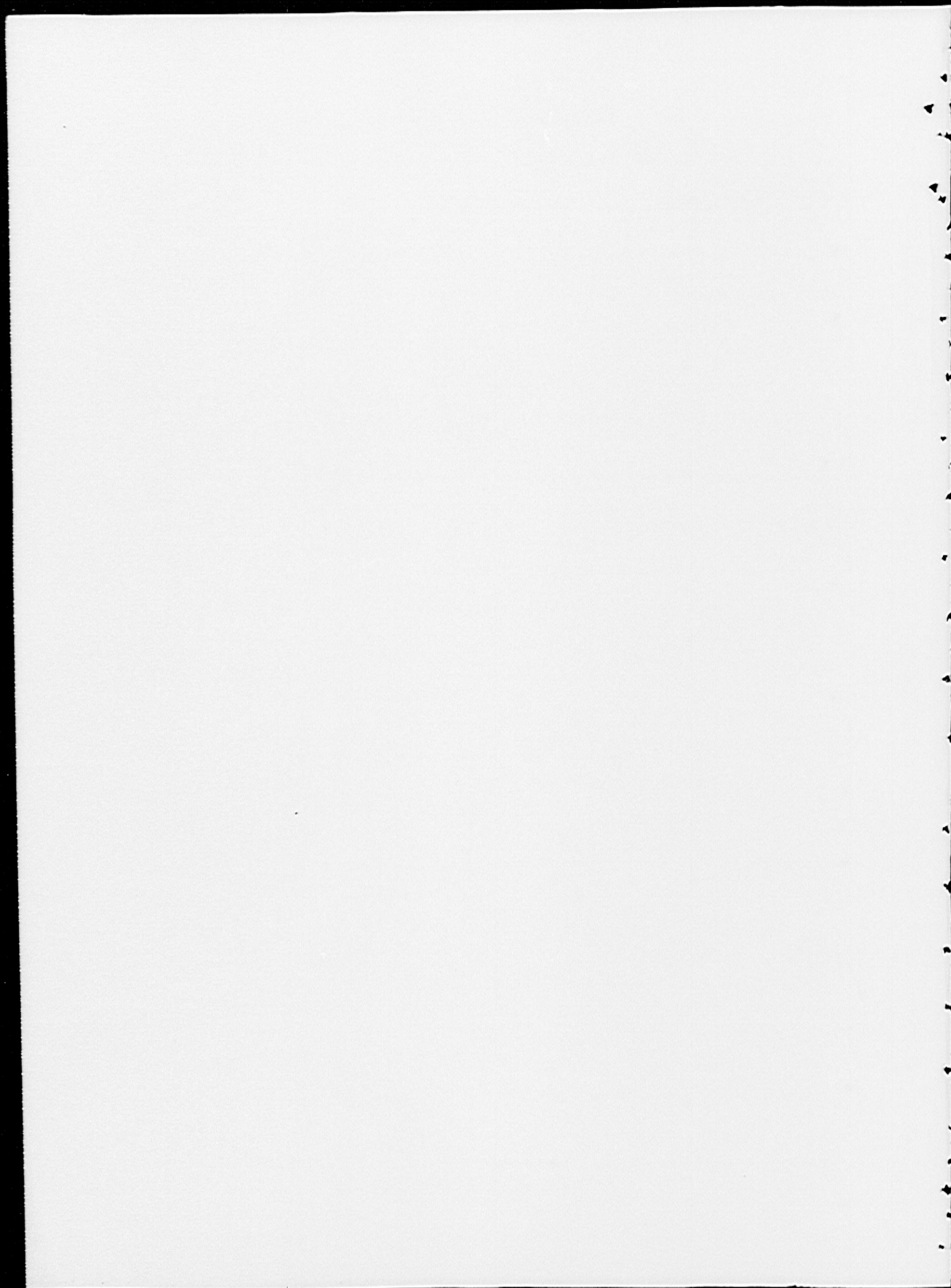
Respondent,

and

D. C. TRANSIT SYSTEM, INC.

Respondent-Intervenor

PETITION TO REVIEW ORDER OF THE
WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION



COUNTERSTATEMENT OF CASE

The Brief for Petitioner sets forth an adequate summation of the background data in this proceeding. Pursuant to the stipulation reached by the parties herein, all pertinent facts are set out in Commission Order No. 824 which is reprinted in the Appendix to the Brief for Petitioner.

It is important to note that it is conceded that the Respondent is authorized to condition a grant of authority on an interline agreement and that the only question herein is was its imposition in this case reasonable and required by the public convenience and necessity.

STATUTES INVOLVED

All pertinent statutes are printed in the Brief for Petitioner except that set forth below:

Washington Metropolitan Area Transit Regulation Compact,
Article XII, Title II, Section 7

Through Routes, Joint Fares

7. (a) In order to encourage and provide adequate transit service on a Metropolitan District-wide basis, any carrier may establish through routes and joint fares with any other carrier subject to this Act or the jurisdiction of the Interstate Commerce Commission, the State Corporation Commission of the Commonwealth of Virginia, or the Public Service Commission of the State of Maryland.

(b) Whenever required by the public convenience and necessity, the Commission, upon complaint or upon its own initiative, and after hearing held upon reasonable notice, may establish through routes and joint fares for transportation subject to this Act, and the regulations or practices affecting such fares, and the terms and conditions under which such through routes shall be operated.

(c) Whenever, upon complaint or upon its own initiative, and after hearing upon reasonable notice, the Commission is of the opinion that the divisions of any joint fare for transportation subject to this Act are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the participating carriers, the Commission shall prescribe the just, reasonable and equitable divisions thereof to be received by the participating carriers. The Commission may require the adjustment of divisions between such carriers from the date of filing the complaint or entry of the order of investigation, or such other date subsequent thereto as the Commission finds to be just, reasonable and equitable.

SUMMARY OF ARGUMENT

A. The Commission can Condition a Grant of Operating Authority on the Maintenance of an Interline Agreement.

Since WMA Transit Company (WMA) has conceded this question, the only issue here is the reasonableness of that condition.

The Washington Metropolitan Area Transit Commission (Commission) did not err in conditioning the grant of authority upon WMA and D. C. Transit System, Inc. (Transit) entering into an interline agreement. The Washington Metropolitan Area Transit Regulation Compact (Compact), Public Law 86-794, 74 Stat 1031-1, D. C. Code 1410, Section 4(b)^{1/} gives the Commission the power to attach any condition to a certificate; in this respect, the Commission's authority is limited only by the requirement that the condition be reasonable and required by the public convenience and necessity: Anything within this ambit is proper.

The Commission interpreted the term "condition" to embrace an interline agreement. Under established principles of administrative law, an agency's interpretation of a statutory clause must be upheld if reasonable.

^{1/} Unless otherwise indicated, all cites to the Compact refer to Article XII, Title II.

B. On the Basis of the Evidence of Record, the Imposition of the Aforesaid Condition was Reasonable and Required by the Public Convenience and Necessity.

Wishing to provide the optimal service, the Commission embarked upon the task of choosing the carrier best suited to provide the operation for which a definite need had been established. The Commission, aware that a grant of authority to one carrier could cause undesirable effects for the other and that numerous disadvantages would flow from a duplication of service, attempted to do justice by balancing the interests and thus keep all parties whole. It decided to (a) allow WMA to extend its service into Transit's territory and to (b) deny Transit's applications. Yet, it conditioned this grant of authority to WMA on the carriers entering into an interline agreement. This agreement was held by the Commission to be a "remedy" within the meaning of Section 4(e) of the Compact, which provided that service cannot be extended over the routes of another carrier without premitting the existing carrier to remedy any inadequacy found in existing service. This interline agreement was a means of complying with this section of the Compact while allowing WMA to extend its service. Hence, the Agreement is fair and reasonable, and the Order must be affirmed.

I

THE COMMISSION CAN CONDITION A GRANT OF
OPERATING AUTHORITY ON THE MAINTENANCE
OF AN INTERLINE AGREEMENT

Broadly stated, the Commission is entrusted with
". . .the regulation and improvement of transit and the
alleviation of traffic congestion. . .". Title I, Article II,
Compact. Pursuant to this fundamental obligation, the
Commission is authorized to:

"issue a certificate . . .authorizing the whole or
any part of the transportation [requested]. . . .
The Commission shall have the power to attach to
the issuance of a certificate and to the exercise
of the rights granted thereunder such reasonable
terms and conditions as the public convenience and
necessity may require; provided, however, that no
terms, conditions, or limitations shall restrict
the right of the carrier to add to his or its equip-
ment and facilities over the routes, between the
termini, or within the territory specified in the
certificate, as the development of the business and
the demands of the public shall require."

Section 4(b), Compact [emphasis added]

An interline agreement can be a term or condition within
the scope of Section 4(b) of the Compact. The Compact, in
this respect, is phrased in general wordage and does not
specifically list a series of restrictions. This allows the
Commission substantial latitude to create, fashion, and impose
as a term or condition the solution most in accord with the
public interest. The Compact and its provisions are to

". . .be liberally construed to eliminate the evils described therein and to effectuate the purposes thereof." Article XI, Title I, Compact. Consequently, the Commission's authority to promulgate terms or conditions is by and large discretionary and is limited only in that such terms or conditions must be responsive to the public interest and must not prevent the holder from adding to its equipment and facilities. Alexandria, Barcroft, and Washington Transit Co. v. WMATC, 323 F. 2d 777 (4th Cir 1963).

WMA concedes the fact that an interline agreement can be a condition within the meaning of Section 4(b) of the Compact. (Brief for Petitioner, p. 9). The Commission acted within reason in interpreting "term or condition" to embrace such an agreement; hence, its construction of Section 4(b) of the Compact must be affirmed. Classified Directory Subscribers Association v. District of Columbia Public Service Commission, 383 F. 2d 510 (D. C. Cir 1967).

II

ON THE BASIS OF THE EVIDENCE OF RECORD THE IMPOSITION OF THE AFORESAID CONDITION WAS REASONABLE AND REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY

In this case, the Commission found that the public convenience and necessity required through service from WMA's service area to the Farragut Square area of the District of Columbia (App. 11). Transit's transfer service was found inadequate to accommodate today's needs (App. 10, 15, 16).

A. The Commission's Action Was Fair, Reasonable, and Required By the Public Convenience and Necessity.

To deal with this problem, the Commission had before it an application from WMA to extend its service to Farragut Square and two applications from Transit to extend its service deep into WMA's territory. The Commission undertook to evaluate the practical consequences entailed in each request. On the one hand, WMA could provide the needed service by extending its service for a distance of about one mile into downtown D. C. (i.e., into Transit's franchised territory). The only passengers carried over this additional mile would be those originating in WMA territory, no others (App. 18). The financial impact upon Transit by a grant of WMA's application would not be severe (App. 15, 19). On the other hand, a grant

of Transit's applications would involve a penetration of about 5.5 and 2.1 miles into WMA's certified territory (App. 19). The financial impact of this upon WMA would be substantial: WMA's revenue loss would exceed \$400,000 a year (App. 20). This would present considerable problems for WMA; one is that it would undoubtedly place a heavy burden on it to maintain adequate service (App. 20, 21). Moreover, WMA, like Transit, was entitled to the protection of Section 4(e) of the Compact. Transit could not extend its service over WMA's routes without providing WMA with a reasonable opportunity to remedy an inadequacy found to exist. Thus, the Commission concluded that the protection afforded Transit by Section 4(e) of the Compact did not include the right to provide service over WMA's routes as a "remedy" to an inadequacy in its own service.

In any event, the Commission noted that Transit's financial situation was such that it was perhaps in no position to provide service extensions of the magnitude contemplated in its applications (App. 20, 21). Moreover, the Commission was very concerned about Transit's ability to render an adequate service for its present patrons. The possibility of a deterioration of Transit's service caused by

additional passengers diverted from WMA buses was a serious factor (App. 12. 20).

However, the Commission wished to be certain that its disposition of the matter would not imperil the financial position of Transit. The Commission was, of course, required by Section 4(e) of the Compact to provide Transit with a reasonable time or opportunity to remedy its service prior to permitting a competitive service to operate over its routes. Transit's transfer service would not remedy the problem because the Commission had found that the public interest demanded the installation of a through-service (App. 16, 18). As previously noted, Transit's proposal to extend its routes into WMA's territory was not, in the Commission's view, intended to be a "remedy" within the working of Section 4(e) of the Compact. However, Transit suggested another possible remedy - an interline agreement (App. 21).

This solution was extremely advantageous. First, it provided Transit with an adequate remedy under Section 4(e) of the Compact; it was a remedy acceptable to Transit. The rate to be paid Transit (3.4¢ per revenue mile operated in the extended service) called for an annual cost of only about \$3,000. This presented the admirable feature of

compensating Transit on a basis which reflected the possible impact upon Transit of the service provided by WMA. As a result, Transit would remain whole, its service would not deteriorate, and its patrons would not be inconvenienced. And, as far as WMA was concerned, it would allow it to extend its service to the Farragut Square area for the payment of a fee which would not burden WMA or its riders. Moreover, the service could be installed at once, thus immediately providing a through-trip to the new terminal. The Commission concluded, therefore, that the interline agreement was a reasonable "remedy" to the inadequacy in Transit's service it had found to exist. The Compact itself, in Section 7 thereof, provides for the existence of interline agreements. Since the agreement was clearly appropriate as a remedy under Section 4(e) and was authorized under Section 7, there is no substance whatever in WMA's argument that the agreement did not meet the standard, set out in Section 4(e), that conditions attached to certificates be "reasonable" and required by "public convenience and necessity".

In its brief, WMA has failed to support its attack on the reasonableness of the condition. To begin with, WMA has remarked that the said condition is unreasonable because

the financial impact on Transit is minimal. (Petitioner's Brief, page 11).

This ignores the standards set out in Section 4(e) by which a "remedy" for inadequate service is to be tested. That provision does not state that a remedy is appropriate only where the financial impact of a route extension is more than minimal. It calls for a remedy in every such instance. Of course, the nature of the remedy should reflect the severity of the impact of the extension. This remedy does so. The impact is minimal and the burden of the remedy, i.e.,
^{2/} the interline agreement, is minimal.

Based on statutory language virtually identical to the
^{3/} Compact, the Interstate Commerce Commission (I.C.C.) has imposed conditions similar to the one concerned herein. In Morgan Express, Inc., Extension-Hollis, Oklahoma, 86 MCC 549,

^{2/} Throughout the proceeding this exact solution - that is, an interline agreement - was frequently suggested by WMA. WMA, however, wanted a non-cancellable agreement (App. 23). Since the agreement ordered by the Commission requires approval for termination, it would seem that the WMA objection was satisfied. In light of this, it seems excessively picayunish for WMA to be before this court now alleging that this agreement is unreasonable.

^{3/} Part II of the Interstate Commerce Act, (the "Motor Carrier Act"), 49 USC 208, authorizes the I.C.C. to impose in certificates, reasonable terms, conditions, and restrictions as are called for by the public convenience and necessity.

the I.C.C. conditioned a certificate upon the recipient maintaining a lease of certain intrastate operating authority; in Carolina Coach Co., Extension-Newport News, Virginia, 81 MCC 525, the I.C.C. conditioned a certificate upon the continuing existence of a connecting ferry service; and, in Burgess Extension-Atoka, Oklahoma, 62 MCC 253, the I.C.C. conditioned a certificate upon the maintenance of a lease of certain interstate operating authority. See also Southern Express Co., Extension-Hudson Plant, 72 MCC 529. While I.C.C. decisions are not binding on this Commission,^{4/} the above-related decisions certainly do confirm the reasonableness of the Commission's action in the instant proceeding, at least.

B. The Commission's Action is Reasonable and Supported By Substantial Evidence.

It is clear that the Commission acted appropriately and in accord with the public interest in determining that the imposed condition was both reasonable and required by the public convenience and necessity. The Commission's analyses and interpretations of applicable Compact provisions are

^{4/} The court held in Alexandria, Barcroft, and Washington Transit Co. v. Washington Metropolitan Area Transit Commission, Supra, at 6 that this Commission has the right to establish its own principles and policies different from those of the I.C.C..

logical, reasonable, and meet prescribed standards of judicial review.

"To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The 'reviewing court's function is limited'. All that is needed to support the Commission's interpretation is that it has 'warrant in the record' and a 'reasonable basis of law'."

Unemployment Compensation Commission v. Aragan, 329 U.S. 143 (1946). See also, Udall v. Tallman, 380 U.S. 13 (1965); Universal Battery Co. v. United States, 281 U.S. 580 (1930).

As indicated above, the Commission is provided with the utmost latitude in fashioning terms or conditions to be imposed on certificates of public convenience and necessity. In short, its determinations should be reversed only where it has abused its discretionary power.

"Discretion is vested in it to act in the light of the facts as it ascertained, either from the record previously made regarding that application or those of which, in its expertise, it could take official notice. Under such circumstances this court cannot restrain the Commission from so acting, or compel it to take action in any specific manner. So long as Division I did not exceed its jurisdiction, its reason for "revoking", i.e., denial of J-T's application for temporary authority, is not subject to judicial review of an error either of fact or law which induced it to reach that conclusion."

J-T Transport Company, Inc. v. United States, et al.,
368 U.S. 81 (1961).

The evidence of record discussed herein clearly shows that the Commission's determination is supported by substantial evidence.

Recently, the Supreme Court in Illinois Central Railroad Co., et al. v. Norfolk and Western Railway Co., et al., 385 U.S. 57, 66 (1966), again emphasized the standard of review of agency action:

"The test on judicial review is, of course, whether the action of the Commission is supported by 'substantial evidence on the record viewed as a whole', 5 U.S.C. § 1009(e) (5). Substantial evidence is 'enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury'. Labor Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939).

See also, Universal Camera v. NCRB, 340 U.S. 474 (1951); United States v. Pierce Auto, 377 U.S. 515 (1946).

Whatever the shortcomings of the Commission's final determination or whatever the most appropriate disposition of the instant situation would be, the Commission's solution is not without a rational basis and must, as a result, be affirmed. Northeast Airlines, Inc. v. CAB, 331 F. 2d 579 (1st Cir 1964); Mississippi Valley Barge Lines Co. v. United States, 292 U.S. 282 (1934), Section 17(a) Compact.

Consequently, the Commission asserts that the solution reached in the instant proceeding is not only fair, equitable and just, but legally sound.

CONCLUSION

The Commission is authorized to attach any provision as a condition or term to the grant of a certificate if that provision is reasonable and required by the public interest. The evidence of record indicates that the provision imposed in the instant proceeding falls within this requirement. The Commission's decision, being logical, reasonable, and equitable, must be upheld under traditional and established principles of administrative law and judicial review.

WHEREFORE, the Commission respectfully prays that Order No. 826 be affirmed.

Respectfully submitted,

RUSSELL W. CUNNINGHAM
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Dated: